CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 DECEMBER 22, 1993 NO. 50/51

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

Treasury Decisions

(T.D. 93–92)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR NOVEMBER 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holidays: Thursday, November 11, 1993, and Thursday, November 25, 1993.

Greece drachma:

November 1, 1993	$0.004128
November 2, 1993	.004131
November 3, 1993	.004131
November 4, 1993	.004114
November 5, 1993	.004129
November 8, 1993	.004142
November 9, 1993	.004121
November 10, 1993	.004128
November 12, 1993	.004124
November 15, 1993	.004130
November 16, 1993	.004095
November 17, 1993	.004099
November 18, 1993	.004086
November 19, 1993	.004077
November 22, 1993	.004105
November 23, 1993	.004095
November 24, 1993	.004107
November 26, 1993	.004071
November 29, 1993	.004090
November 30, 1993	.004057

FOREIGN CURRENCIES–Daily rates for countries not on quarterly list for November 1993 (continued):

South Korea won:

November 1, 1993	$0.001232
November 2, 1993	.001233
November 3, 1993	.001234
November 4, 1993	.001234
November 5, 1993	.001234
November 8, 1993	.001234
November 9, 1993	.001243
November 10, 1993	.001243
November 12, 1993	.001237
November 15, 1993	.001236
November 16, 1993	.001234
November 17, 1993	.001233
November 18, 1993	.001233
November 19, 1993	.001234
November 22, 1993	.001235
November 23, 1993	.001235
November 24, 1993	.001234
November 26, 1993	.001233
November 29, 1993	.001233
November 30, 1993	.001233

Taiwan N.T. dollar:

November 1, 1993	N/A
November 2, 1993	$0.037256
November 3, 1993	.037240
November 4, 1993	.037236
November 5, 1993	.037209
November 8, 1993	.037215
November 9, 1993	.037223
November 10, 1993	.037212
November 12, 1993	.037213
November 15, 1993	.037240
November 16, 1993	.037229
November 17, 1993	.037171
November 18, 1993	.037202
November 19, 1993	.037202
November 22, 1993	.037175
November 23, 1993	.037177
November 24, 1993	.037145
November 26, 1993	.037154
November 29, 1993	.037120
November 30, 1993	.037128

Dated: December 2, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 93–93)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR NOVEMBER 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93–82 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holidays: Thursday, November 11, 1993, and Thursday, November 25, 1993.

Austria schilling:

November 19, 1993	$0.082905
November 30, 1993	.082816

Germany deutsche mark:

November 19, 1993	$0.582751
November 30, 1993	.582242

Italy lira:

November 17, 1993	$0.000599
November 18, 1993	.000598
November 19, 1993	.000595
November 22, 1993	.000594
November 23, 1993	.000590
November 24, 1993	.000594
November 26, 1993	.000591
November 29, 1993	.000590
November 30, 1993	.000587

Netherlands guilder:

November 19, 1993	$0.519508
November 30, 1993	.519022

Spain peseta:

November 24, 1993	$0.007228
November 26, 1993	.007159
November 29, 1993	.007144
November 30, 1993	.007087

Sri Lanka rupee:

November 1, 1993	N/A
November 2, 1993	N/A
November 3, 1993	N/A
November 4, 1993	N/A
November 5, 1993	N/A

FOREIGN CURRENCIES – Variances from quarterly rates for November 1993 (continued):

Switzerland franc:

November 1, 1993	$0.666001
November 2, 1993	.666001
November 3, 1993	.665779
November 4, 1993	.665115
November 9, 1993	.668449
November 12, 1993	.667646
November 16, 1993	.666445
November 17, 1993	.667780
November 18, 1993	.665336
November 19, 1993	.663570
November 26, 1993	.667557
November 30, 1993	.666578

Dated: December 2, 1993.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

TARIFF CLASSIFICATION OF CAMERA LENSES IMPORTED IN SAME SHIPMENT WITH CAMERA BODIES

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Proposed change of position; solicitation of comments.

SUMMARY: This notice advises the public that Customs proposes a change of position regarding the classification of different sized camera lenses imported in the same shipment with an equal number of 35mm camera bodies under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to rulings on such shipments, Customs has classified as a single tariff entity each camera body and "normal" lens which could be matched together. We now propose that camera bodies and lenses, if they are imported in the same shipment but are not packaged together for retail sale as cameras and lenses, are presumed to retain their separate commercial identities and are separately classifiable under the HTSUS. The result of this proposed change of position under the HTSUS would be an increase in the rate of duty on subject lenses not put up together for retail sale with matched camera bodies at the time of entry, because the lenses would no longer be classifiable together with camera bodies as cameras, but would be separately classifiable as lenses. This proposed change of position does not apply to lenses and camera bodies, imported together in the same shipment in equal numbers, which will be put up together for retail sale at the time of entry into the U.S. Before adopting this proposed change of position, consideration will be given to any written comments timely submitted in response to publication of the document.

DATES: Comments must be received on or before February 7, 1993.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments filed may be inspected at the Office of Regulations and Rulings, Regulations Branch, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington D.C.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Office of Regulations and Rulings (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a ruling dated May 2, 1988 (HQ 076497), it was determined by Customs that, under the Tariff Schedules of the United States (TSUS), the precursor to the Harmonized Tariff Schedule of the United States (HTSUS), a 35mm camera body matched up with a "normal" lens in the same shipment was a single tariff entity. Specifically, it was held that a 35mm single lens reflex camera body imported with a 50–55mm lens was a single article subject to classification under item 722.16, TSUS, as a camera. It was also determined that zoom lenses with a focal length of 35mm to 70mm had also become "normal" lenses when imported with the 35mm camera bodies.

The position of classifying a 35mm camera body imported with a "normal" lens in the same shipment as a single entity continued after the transition from the TSUS to the HTSUS on January 1, 1989.

Under the HTSUS, the subheadings under consideration are as follows:

9006.51.00: [o]ther cameras: [w]ith through-the-lens viewfinder (single lens reflex (SLR)), for roll film of a width not exceeding 35mm.

The general, column one rate of duty is 3 percent *ad valorem*.

9002.11.80: [o]bjective lenses and parts and accessories thereof: [f]or cameras, projectors or photographic enlargers or reducers: [o]ther.

The general, column one rate of duty is 6.6 percent *ad valorem*.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive, are to be used to determine the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Note 90.06(I) (p.1465) provides that heading 9006, HTSUS, covers all kinds of photographic cameras (other than cinematographic cameras), whether for professional or amateur use, and whether or not presented with their optical elements (objective lenses, viewfinders, etc.). It further states that there are many different types of cameras, but the conventional types consist essentially of a light-tight chamber, a lens, a shutter, a diaphragm, a holder for a photographic plate or film, and a viewfinder.

Explanatory Note 90.06(I) states that a camera body with a lens constitutes a camera. Therefore, a lens and a camera body, imported in the same shipment and put up together for retail sale at the time of entry into the U.S., are classifiable under subheading 9006.51.00, HTSUS, as a camera. However, the note also states that a camera body constitutes a camera whether or not presented with the optical element. The issue, then, is whether camera bodies, imported with numerous camera lenses in the same shipment and not put up together for retail sale once entered into the U.S., constitute complete and unassembled cameras.

It is noted that imported merchandise must be classified under the HTSUS with reference to its condition as imported.

General Rule of Interpretation (GRI) 2(a), HTSUS, provides that any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Explanatory Note 2(a)(V) (p. 2) states that the second part of Rule 2(a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.

Customs deems that numerous camera lenses, imported together with an equal amount of 35mm camera bodies in the same shipment and not put up together for retail sale at the time of entry into the U.S., do not constitute complete and unassembled cameras, and the different sized lenses are separately classifiable under subheading 9002.11.80, HTSUS, as objective lenses for cameras. The camera lenses and the camera bodies retain their separate commercial identities. As imported, Customs is of the opinion that they lack the degree of commercial integration to be considered as cameras with lenses, unassembled, for purposes of GRI 2(a).

The proposed change of position would also apply to different sized lenses imported together with an unequal amount of 35mm camera bodies. Those lenses and camera bodies put up together for retail sale would be classifiable under subheading 9006.51.00, HTSUS, as cameras. The remaining lenses in the shipment, not put up together for retail sale at the time of entry with corresponding camera bodies, would be classifiable under subheading 9002.11.80, HTSUS, as objective lenses for cameras.

Accordingly, the proposed position of Customs under the HTSUS is in conflict with HQ 076497, a TSUS ruling, in that "normal" lenses imported in the same shipment with an equal number of 35mm camera bodies, and not put up together for retail sale at the time of entry into the U.S., would be separately classifiable under subheading 9002.11.80, HTSUS. Because the lenses would be dutiable at 6.6 percent *ad valorem*, instead of the 3 percent rate of duty for cameras under subheading 9006.51.00, HTSUS, we are soliciting comments from the public.

AUTHORITY

This notice is published in accordance with section 177.10, Customs Regulations (19 CFR 177.10).

COMMENTS

Before adopting this proposed change in position, consideration will be given to any written comments timely submitted to Customs.

Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 103.11(b)), on regular business days between the hours of 9:00 and 4:30 p.m. at the Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: November 8, 1993.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, December 7, 1993 (58 FR 64423)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 141 and 142

RIN 1515–AB21

PREFILING OF ENTRY DOCUMENTATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to limit the privilege of prefiling entry documentation. The purpose of these proposals is twofold. The proposals are intended to eliminate a window of enforcement vulnerability which exists when selectivity results are released before shipments are loaded at the foreign port of export. If adopted, the proposals also will provide incentive for carriers to automate.

DATES: Comments must be received on or before February 11, 1994.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, NW, Washington, D.C. 20229 and may be inspected at Franklin Court, 1099 14th Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Ernest Cunningham, Office of Inspection and Control, (202) 927–0167.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, merchandise for which entry is required shall be entered by the consignee within 5 working days after the entry of the importing vessel or aircraft, report of the vehicle, or arrival at the port of destination in the case of merchandise transported in bond. After the merchandise is entered, Customs generally determines, after examining the entry documentation, whether the merchandise merits examination and whether to release the merchandise.

Pursuant to section 142.2(b), Customs Regulations (19 CFR 142.2 (b)), Customs has permitted entry documentation to be submitted before the merchandise arrives within the limits of the port where the entry is to be made. This is called prefiling. In these cases, Customs reviews the submitted documentation and determines whether the mer-

chandise is releasable even before the merchandise arrives. The merchandise is actually released at the time it arrives within the port limits. Currently any filer may prefile entries arriving on any carrier.

The advantage of prefiling is that before the merchandise actually arrives, the carrier is able, by receiving a provisional release by Customs, to make decisions on staging the cargo, and the importer is enabled to arrange for examination or release and further distribution of the merchandise.

On November 6, 1991, in a document published in the Federal Register (56 FR 56608), Customs announced in an Advance Notice of Proposed Rulemaking that it was considering amending the Customs Regulations to limit prefiling privileges to entries filed by entry filers who are participants in the Automated Broker Interface (ABI) and to entries filed by non-ABI entry filers for merchandise that is transported on carriers that are participants in the Automated Manifest System (AMS). The document further gave advance notice that if the proposal is adopted, within 6 months of its adoption, selectivity results (determination whether a general or intensive examination of merchandise is necessary) will be released prior to carriers' arrival only to entry filers whose merchandise is transported on carriers that are participants in AMS. This would mean, in effect, that while entry filers who are participants in ABI may continue to prefile, provisional releases will only be issued by Customs for merchandise transported on AMS carriers.

It should be noted that no regulatory change is necessary to implement Customs proposed action to release selectivity results prior to carriers' arrival only to entry filers whose merchandise is transported on carriers that are participants in AMS. It is solely within Customs enforcement discretion to determine when imported merchandise should be released.

The purposes of these actions would be to provide incentive for carriers to automate as well as to improve enforcement by eliminating a window of vulnerability which currently exists when selectivity results are released before shipments are loaded at the foreign port of export. In addition, limiting prefiling privileges to automated carriers and brokers would make Customs more efficient. There would be less keystroking, less manual tracking and less paper releases required.

The Advance Notice of Proposed Rulemaking solicited comments. Thirty-six letters were received, many of them setting forth similar comments. A discussion of the comments follows.

Discussion of Comments

Comment:

Although Customs states that participation in AMS is voluntary, it is forcing carriers to automate.

Response:

Participation in AMS is voluntary; however, Customs obviously would greatly prefer total participation. Customs has stated that its goal

is to accept only electronically transmitted cargo manifests via AMS by 1996. While each carrier must determine on its own whether it wishes to participate, Customs will continue to provide incentives for automating. Customs is proceeding with a variety of statutory and regulatory changes that will provide the needed legal mechanisms for electronic data exchange and continues to develop incentives to encourage automation. Customs believes that limiting the privilege of prearrival notifications to those shipments carried by automated carriers is a legitimate tool to encourage automation.

Comment:

Customs originally used the prefiling privilege as an incentive to get Customs brokers to invest in ABI. Taking away this privilege is unfair as ABI filers have no control over whether a carrier uses AMS.

Response:

ABI brokers will still be able to prefile entries via ABI. This privilege is not being taken away. This proposal will limit prefiling of entry documentation to ABI entries and those non-ABI entries which are filed against shipments being carried by AMS carriers or Air AMS Express Consignment Module participants. Results of cargo selectivity processing will only be released before arrival when the shipment is reported in AMS. Although brokers may prefile entries electronically for shipments not reported in AMS, results will not be returned to the broker or carrier until the conveyance carrying the shipment has arrived. While Customs expects that this proposal will provide strong incentive for carrier automation, this proposal is also intended to eliminate a window of vulnerability which currently exists when selectivity results are released before shipments are loaded at the foreign port of export. Customs will provide selectivity results to the trade as soon as it is reasonably sure that the shipment cannot be manipulated. AMS enables Customs to do this prior to arrival due to the fact that manifest data is provided to Customs before the freight arrives. For non-AMS carriers, Customs first receives notice of the actual importation of a shipment when the paper manifest is presented to Customs after arrival. These timeframe differences are the primary reason why selectivity results will be delayed for shipments arriving on non-AMS carriers under this proposal.

Comment:

Customs is proposing to create an administrative nightmare for itself and its constituency by having to distinguish merchandise that is entered by an ABI participant from that which is entered by a non-ABI participant and merchandise that is carried by an AMS carrier from that which is carried by a non-AMS carrier.

Response:

Customs believes that the distinctions that are proposed for determining which entries may be prefiled can be implemented through programming changes, and that there would be no ensuing administrative

nightmare. Further, if there is any disruption of administrative procedures caused by this proposal, the long-term benefits of automation will vastly outweigh the short-term costs of any disruption. Customs firmly believes that only through automation will Customs be able to meet the reality of increased workload with static resources. Only through AMS will Customs efficiently and effectively be able to meet its mission of enforcing laws and regulations while facilitating the movement of cargo.

Comment:

The 6 months notice proposed in the advance notice between when prefiling will be permitted for merchandise not carried on AMS participating carriers that is entered by ABI brokers and when selectivity results no longer will be released to ABI brokers when merchandise is carried on carriers that are not participants in AMS is not sufficient notice for carriers and importers to automate. Most firms will not make the required investment to automate until the rule is adopted. A 24–month postponement to develop effective air manifest options in software and more cost effective service centers is suggested.

Response:

Customs believes that postponement would serve no purpose as one can always hope for more cost effective measures to be available in the future. By publishing an advance notice and a notice, Customs believes it is giving carriers and importers an adequate heads-up.

Comment:

The cost of automation through direct interface and software packages is prohibitive. It is suggested that due to cost, carriers send their manifests to Customs or to a port authority for input for a fee.

Response:

Customs has no control over the cost of automation. Cost is determined by the method of interface chosen by the participant. The cost of direct interface is determined in part by the level of automation of the participant. The cost of software packages is determined by the software vendors. It should be noted, however, that Customs is always looking for ways to encourage automation. Accordingly, Customs has developed alternate means of communications such as direct interface on a dedicated LU 6.2 protocol line, network interface on a dedicated LU 6.2 protocol line, direct interface on a LU 6.2 dial-up, and direct interface on a remote job entry dial-up. Also, along the lines of the suggestion that carriers send manifests to Customs or port authorities for input for a fee, Customs does allow the use of service centers which permit users to share the costs of ACS/AMS interface. In addition, Customs is exploring the possibility of developing public use terminals for those carriers who do not automate or choose not to use a service center. Customs agrees that the cost of automation may appear high in the short term, but believes that in the long term, the costs will be worth it. To paraphrase an old adage, Customs believes that when considering the costs of automation, one should not be penny-wise and pound foolish.

Comment:

If Customs desires to induce more carriers to participate in AMS, any proposal toward this end should confine its impact to the carriers, each of which bears ultimate responsibility for its decision to automate, and not to the release of the cargo, which affects the broker and the importer.

Response:

If the importation process were clearly departmentalized, Customs would be able to create incentives for carriers to automate that would not affect other parties. However, in the real world, all aspects of the importation process are interrelated. If prefiling privileges were to continue to be granted to ABI brokers when merchandise is carried on carriers not participating in AMS, there would be little incentive for those carriers to automate. Customs ultimate goal is to encourage as much automation as possible in the import arena, and to offer incentives to parties whose entire transactions are automated.

Comment:

The goal of Customs advance notice will not be achieved because the selection of a carrier will not be determined by whether or not the carrier is an AMS participant. The primary factors in determining what carrier to use is the freight forwarder chosen, the freight rate quoted, and the speed of delivery to the U.S.

Response:

Customs is expecting that the advantages that derive from prefiling will encourage importers to include AMS participation in the equation when determining what carrier to use.

Comment:

Customs should seek to add participants to its automated systems by making the programs attractive and not by punitive action. Incentives may be in order, but accepted practices, such as allowing prefiling for all, should not be changed.

Response:

Any incentive that Customs develops to make a program attractive would ultimately give an advantage to one party over another; that is the nature of an incentive. Customs does not perceive its proposal as punitive; it perceives it as a method within its discretion to encourage automation. As stated previously, prefiling is a privilege. Customs has been very generous in granting the privilege in the past and one could argue that the advantages of prefiling have been taken for granted by many entry filers. Customs has determined that its ability to grant or withhold prefiling privileges is a powerful incentive to encourage automation and that it is within Customs discretion, by following rulemaking procedure, to establish new criteria for the granting of the prefiling privilege.

Comment:

A limited exception should be made to the advance notice to permit prefiling of import documents by importers of self-propelled aircraft

and parts needed to support aircraft on the ground (AOG) even though such importations do not involve participation in AMS or ABI.

Response:

It is not Customs goal to develop a rule with exceptions. Customs is proposing to allow prefiling privileges based on whether a conveyance is on AMS. Customs believes that it would be opening Pandora's box and would create an administrative nightmare if it were to recognize specific types of cargo as being exempt from its prefiling limitation.

Comment:

The 4–hour deadline for AMS filing by all parties is a very strong deterrent for forwarders who would be required to staff offices at premium pay during nighttime hours to ensure that an AMS filing was timely for air freighter arrivals.

Response:

This issue was raised by 15 commenters, which surprised Customs because there was no mention in the advance notice of any 4–hour deadline. In fact, there is no 4–hour deadline to supply or change manifest information. Customs can receive updated manifest data anytime prior to or after the arrival of a conveyance. If, however, there is updated information, Customs requires the information in a different format with the reason for the update given.

Comment:

The proposal is inconsistent in its references to filing privileges. Customs alternately refers to ABI filers and AMS filers, ABI filers *or* AMS filers, and AMS filers only as being subject to the proposal.

Response:

Eleven comments were received that noted this apparent inconsistency. Yet, upon rereading the advance notice of proposed rulemaking, we fail to see any reference to or use of the term "AMS filer." The advance notice and this notice discuss that those who will be entitled to prefile are entry filers who are participants in the Automated Broker Interface, regardless of whether the merchandise being entered is transported on a carrier which is a participant in AMS, and entry filers who file entries manually for merchandise which is being transported on carriers that are participants in AMS. If this proposal is adopted, within 6 months after its adoption, prefiling will still be permitted for both of these types of entry filers; however, selectivity results will be released prior to carriers' arrival only to entry filers whose merchandise is transported on carriers that are participants in AMS.

Comment:

The proposal should be modified to recognize that AMS transmissions through the Express Consignment Module of Air AMS will be accepted for purposes of prefiling entry documentation and obtaining express clearance status regardless of the AMS status of the actual carrier.

Response:

Customs agrees. Customs does not intend to affect the express consignment module of Air AMS either through the proposed amendment or by withholding selectivity results until a carrier's arrival if there is an AMS transmission through the Express Consignment Module of Air AMS regarding that carrier. Express consignment facilities, pursuant to Part 128 of the Customs Regulations, may process and receive pre-arrival notifications regardless of whether the carrier is an AMS participant. Accordingly, this modification is referenced in the regulatory language that is proposed below.

Comment:

If the proposal is adopted, it will delay cargo, disrupt carrier operations, interfere with normal competition between carriers and ports. Further, the proposal would negatively impact bulk trade as well as many small general cargo carriers as agents of such carriers as bulk cargo and oil vessels do not have the resources in which to automate.

Response:

Customs is aware that the proposal may disrupt the operations of non-automated carriers and entry filers who elect to use these carriers to transport their merchandise. However, after considering future workload increases and a presumably static workforce, Customs must make changes to its policy on the prefiling of entries. If Customs is to fully automate its cargo processing procedures by 1996, as stated in our 5–Year Plan, a change to the prefile policy is necessary. An important milestone in the achievement of our 5–Year Plan is the creation of the Automated Manifest System (AMS). As an incentive for carriers, deconsolidators, and freight forwarders to participate in AMS, changes to the privileges associated with prefiling entries are necessary.

Many entities (carriers, freight forwarders, port authorities, deconsolidators and service centers) involved in the movements of international cargo have realized the benefits of AMS participation. Some of these benefits are: faster release of low risk shipments; the ability to file or amend manifest or waybill data electronically; standardized billing, accounting, delivery and traffic control information; receipt of exam notifications; confidentiality of data; and reduced paper costs. Customs charges no fee for participation in AMS and assistance is provided during development by a Customs representative.

The costs incurred for developing or purchasing software and hardware are the AMS participant's responsibility. However, these costs can be lessened for bulk and small general cargo carriers by purchasing existing approved systems or by using a service center or port authority to provide the automated interface. To further minimize communication costs Customs offers a direct (800 number) dial-up access feature, available to both air and sea users.

Comment:

It is necessary for Customs to fine-tune the AMS system before Customs makes more demand on the industry to enlist in the program. There is an expense that all of industry should not have to bear until the system is substantially developed to a more effective and stable level, leaving only limited adjustments. As evidence of how inadequate Air AMS is operationally, it is pointed out that the Air AMS module is not currently being used except by a few carriers in two locations, JFK and LAX airports.

Response:

Customs disagrees with this comment. AMS has developed into an effective and stable automated tool. As with any automated system, we strive to constantly improve it, and at times changes are made to better serve the importing community. However, these changes are minor and are not disruptive to the daily operations of its users. Proof of the system's effectiveness is evidenced by the fact that approximately 65 percent of all ocean bills are transmitted in AMS by nearly 80 carriers. The system's effectiveness is further evidenced by the fact that several participants in AMS have voluntarily spoken before Customs-sponsored trade seminars and meetings to expound the benefits of the system.

The commenter is incorrect regarding the usage of Air AMS. As of July 1, 1993, Air AMS is currently operational at 17 locations: JFK, Anchorage, Chicago, St. Louis, Miami, Los Angeles, Washington, D.C., San Francisco, Boston, Philadelphia, Atlanta, Louisville, Charlotte, Newark, Honolulu, Memphis and Seattle. Twenty-one air carriers are currently participating in AMS. Additionally, a total of 20 freight forwarders and deconsolidators are participating. Several others are testing data transmissions. When completed, they will come on-line. Air AMS currently processes over 65,000 shipments per week, including more than half of all shipments that pass through JFK International Airport in New York, one of Customs largest ports.

Comment:

A carrier should not be required to test and qualify at each new port of entry. This practice increases the carriers' cost and somewhat discourages them from participating in the AMS program.

Response:

There was no mention in the advance notice of any such requirement and, in fact, an AMS carrier is not required to test at each new port.

Comment:

Customs has not worked out such air manifest issues as split shipments and house and sub-house bill numbers in addition to master bill numbers.

Response:

Customs disagrees with this comment. Customs, in its design of Air AMS, specifically adopted and built in measures to account for the han-

dling of split shipments and house and sub-house bill numbers. These issues pose no problem in the processing of Air AMS shipments.

Comment:

Customs should not require an AMS participant to have all flights that arrive within a particular port be reported through AMS.

Response:

There are two reasons for requiring that all shipments of an AMS carrier within an automated port be included. First, having only part of the shipments in AMS causes an administrative burden on Customs field personnel in determining whether AMS or paper processing is needed. Second, the shell record notifications currently sent to ABI brokers would be rendered useless as a problem resolution tool since a shell record would be created for every bill not part of AMS.

Comment:

This proposal is an attempt by Customs to cover up past mistakes in the administration of AMS by forcing carriers to participate in the program.

Response:

While Customs is the first to admit that it is not infallible, this proposal stems from our attempts to rectify a legitimate enforcement concern and to implement the Customs Five Year Plan drafted in 1991, which attempts to achieve an almost totally electronic exchange of information. Our goal is to protect the integrity of Customs processing while encouraging those parties involved in the import process to automate.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs, Franklin Court, Suite 4000, 1099 14th Street, NW., Washington, D.C.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ANALYSIS

For the reasons set forth in the preamble, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that the proposed amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 141 AND 142

Customs duties and inspection; Imports; Reporting and recordkeeping requirements.

PROPOSED AMENDMENTS

It is proposed to amend parts 141 and 142, Customs Regulations (19 CFR parts 141, 142) as set forth below:

PART 141 – ENTRY OF MERCHANDISE

1. The general authority citation for part 141 and the specific authority citation for section 141.68 continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

§ 141.68 also issued under 19 U.S.C. 1315;

* * * * * * *

2. It is proposed to amend § 141.68(a)(3) to read as follows:

§ 141.68 Time of entry.

(a) *When entry documentation is filed without entry summary.*

* * * * * * *

(3) The time the merchandise arrives within the port limits, if the entry documentation is submitted before arrival in accordance with § 142.2(b)(1) of this chapter, and if requested by the importer on the entry documentation at the time of submission.

* * * * * * *

PART 142 – ENTRY PROCESS

1. The authority citation for part 142, Customs Regulations (19 CFR part 142) continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to amend § 142.2(b)(1) to read as follows:

§ 142.2 Time for filing entry.

* * * * * * *

(b) *Before arrival of merchandise –*

(1) *Entry.* The time of entry shall be the time specified in § 141.68(a) if entry documentation required by § 142.3(a) is submitted before the merchandise arrives within the limits of the port where entry is to be made. Entry documentation may be so submitted only if:

(i) Entry documentation is submitted electronically through the Automated Broker Interface; or

(ii) The merchandise for which the entry documentation is being filed, whether the documentation is filed through the Automated Broker Interface or manually, is transported by a carrier that participates in the Automated Manifest System; or

(iii) Regardless of whether the carrier transporting the merchandise for which the entry documentation is filed is an AMS participant, there is an AMS transmission through the Express Consignment Module of Air AMS regarding that carrier.

* * * * * * *

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: December 7, 1993.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, December 13, 1993 (58 FR 65135)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–219)

UNITED STATES, PLAINTIFF *v.* MENARD, INC., DEFENDANT

Court No. 89–05–00238

[Judgment for plaintiff in the amount of a penalty for $53,215.30 plus interest.]

(Decided November 22, 1993)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *(Michael S. Kane*, Esq., Attorney), for plaintiff.

Irvin A. Mandel (Thomas J. Kovarick of counsel), for defendant.

MEMORANDUM OPINION AND ORDER

WATSON, *Senior Judge:* This is a decision to determine the amount of penalty to be imposed on defendant under 19 U.S.C. § 1592 for having deprived the government of tariff duty by making negligent false statements on customs entries. In an earlier stage of this action, on a motion for summary judgment, the court found that defendant's negligence had deprived the government of $53,215.30 in duties. *United States v. Menard, Inc.*, 795 F. Supp. 1182 (C.I.T. 1992). The negligence consisted of Menard's failure to ascertain the correctness of its private method of declaring a lower value on entries of merchandise in order to give itself an allowance for past duties paid on defective merchandise.

The penalty statute provides for a trial de novo on all issues, leaving the amount of the penalty to the sound discretion of the court. *United States v. Valley Steel Prod. Co.*, 14 CIT 14, 17, 729 F.Supp. 1356, 1359 (1990). It further provides for limits on the amount of penalty. When ordinary negligence caused the loss of duty, the maximum penalty is the lesser of the domestic value of the merchandise or twice the duty of which the government was deprived. In this case the government seeks the maximum penalty, which is twice the amount of duty.

Many of the basic factors which go into deciding the proper amount of penalty in these cases have been set out in the case of *United States v. Modes, Inc.* et al, F.Supp (CIT 1993) (Slip Op. 93–118, June 24, 1993). It bears repeating that the law requires the court to begin its reasoning on a clean slate. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by

the government has any special weight. *See United States v. Priority Prod., Inc,* 9 CIT 383, 386, 615 Fed. Supp. 591, 593 (1985).

The court heard testimony from three executives of the defendant. As a result, the court finds that a penalty of one times the amount of duty lost is appropriate in this case. In the opinion of the court this situation falls within what can be described as the midrange of ordinary negligence. There was a loss to the government and the carelessness or negligent improvisation which gave rise to it must be penalized. However there are some facets of the case which distinguish it from a case in which stronger punitive measures would be justified.

The need for a more severe penalty is reduced by the fact that the defendant company was not experienced in handling import transactions. It relied heavily on the advice and guidance of a customs broker.

In addition, the court finds some indication of defendant's lack of experience in importing in its failure to timely apply for refunds on the import duty paid for earlier shipments of defective merchandise from the same manufacturer. The existence of such earlier defective merchandise is supported by the fact that defendant obtained a state court judgment for almost three and a half million dollars against the supplier. This, of course, could not serve as a justification for making any deductions from the entered value of the merchandise on the entries here involved. But it does suggest that to some extent the defendant's negligence was "evenhanded" and may have earlier benefitted the government.

In any event, the court is of the opinion that in this case the experience gained by defendant in this regrettable series of events will prevent a recurrence. The court was persuaded by the testimony that those responsible for the negligence have a genuine remorse for their lack of due care and a sincere determination to exercise due care in future customs transactions. Furthermore, the defendant has no record of previous violations.

For the reasons given above, the court finds that a penalty of one times the amount of duty lost should be imposed in this case.

NOTE: This is to advise that Slip Op. 93–220 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 93–220)

_____ *v.* _____

(Slip Op. 93–221)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF GMBH, GMN GEORG MULLER NURNBERG AG, INA WALZLAGER SCHAEFFLER KG, INA BEARING CO., INC., NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, FAG KUGELFISCHER GEORG SCHAFER KGAA, AND PRATT & WHITNEY CANADA INC., DEFENDANT-INTERVENORS

Court No. 91–07–00533

Plaintiffs and defendant-intervenors challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") redetermination on remand filed pursuant to *Federal-Mogul Corp. v. United States*, 17 CIT ___, 824 F. Supp. 230 (1993).

Held: Final judgment is entered ordering the ITA to apply the German value added tax ("VAT") rate to the United States price ("USP") calculated at the same point in the stream of commerce as where the German VAT is applied for home market sales and add the resulting amount to USP. ITA's redetermination on remand is affirmed in all other respects.

[Case dismissed.]

(Dated November 30, 1993)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Wesley K. Caine, Christopher J. Callahan, Myron A. Brilliant and *Amy S. Dwyer)* for plaintiff-intervenor The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys, Douglas S. Cohen* and *Emily Randall,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipell Thomas J. Trendl and *Juliana M. Cofrancesco)* for defendant-intervenors SKF USA Inc. and SKF GmbH.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenor NTN Bearing Corporation of America and NTN Kugellagerfabrik (Deutschland) GmbH.

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce M. Mitchell, Philip S. Gallas, Andrew B. Schroth and *Matthew L. Pascocello)* for defendant-intervenor GMN Georg Muller Nurnberg AG.

Arent Fox Kintner Plotkin & Kahn (Stephen L. Gibson) for defendant-intervenor INA Walzlager Schaeffler KG and INA Bearing Company, Inc.

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, David L. Simon, Andrew B. Schroth and *Matthew L. Pascocello)* for defendant-intervenor FAG Kugelfischer Georg Schafer KGaA.

Donohue and Donohue (William J. Phelan) for defendant-intervenor Pratt & Whitney Canada Inc.

OPINION

TSOUCALAS, *Judge:* Plaintiff Federal-Mogul Corporation ("Federal-Mogul") commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA")

final results in the first administrative review of imports of antifriction bearings from the Federal Republic of Germany. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 56 Fed. Reg. 31,692 (1991).

BACKGROUND

In *Federal-Mogul Corp. v. United States*, 17 CIT ____, ____, 824 F. Supp. 230, 237 (1993), this Court remanded this case to the ITA to

> examine the administrative record to determine the exact monetary amount of [value added tax] paid on each sale in the home market and make sure that the amount added to the comparable [United States price] sale pursuant to 19 U.S.C. § 1677a(d)(1)(C) is less than or equal to this amount, to add the full amount of [value added tax] paid in the home market to [foreign market value] without adjustment, to explain why any savings resulting from deferred payment of sales expenses should or should not be factored into the calculation of each type of [circumstance of sale] adjustment made to [foreign market value] in this review, to reinstate the less-than-fair-value "all others" rate for entries made between May 1, 1992 and June 23, 1992, which have as yet not become subject to a subsequent administrative review, and to correct the computer errors in regard to SKF and INA's dumping margins.

On September 2, 1993, the ITA filed with this Court its Final Results of Redetermination Pursuant to Court Remand, *Federal-Mogul Corporation v. United States* Slip Op. 93–96 (June 4, 1993) *("Remand Results")*. In its Remand Results, the ITA: for certain respondents added to foreign market value ("FMV") the amount of value added tax ("VAT") paid on sales of the subject merchandise in the home market without adjustment and also added the exact same amount to United States price ("USP"); explained in greater detail why savings realized from delayed payment of home market sales expenses should not be factored into the calculation of circumstance of sale ("COS") adjustments to FMV; reinstated the less-than-fair-value ("LTFV") "all others" rate for entries made between May 1, 1992 and June 23, 1992, which have as yet not become subject to a subsequent administrative review; and corrected errors in the final margin computer programs for SKF USA Inc. and SKF GmbH ("SKF") and INA Walzlager Schaeffler KG and INA Bearing Company, Inc. ("INA"). *Remand Results* at 2–13.

DISCUSSION

ITA's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Value Added Tax:*

Federal-Mogul challenges the ITA's treatment of the German VAT. *Federal-Mogul Corporation's Comments Concerning Defendant's Final Results of Redetermination Pursuant to Court Remand ("Federal-Mogul's Comments")* at 3–23.

In its Remand Results, as instructed by this Court, the ITA added the amount of VAT paid on each sale in the home market to FMV without making a COS adjustment to this amount In addition and on its own initiative, the ITA added the exact same amount to USP instead of following its usual practice of applying the *ad valorem* VAT rate to the net USP after all adjustments had been made and adding this amount to USP. *Remand Results* at 2–5; *see Final Results*, 56 Fed. Reg. at 31,729. ITA's rationale for its new approach is based on its interpretation of the United States Court of Appeals for the Federal Circuit's recent decision on the VAT issue in *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1580–82 (Fed. Cir. 1993). *Remand Results* at 2. ITA implemented its stated methodology only for respondents whose dumping margins were being recalculated on remand for some other reason and for respondents who did not participate in the Second Administrative Review because the ITA's new methodology only changes cash deposit rates which are no longer in effect for all respondents. *Id.* at 4–5.

Defendant argues that the ITA's new VAT methodology is responsive to this Court's remand order. Specifically, the defendant argues that this new methodology adds the full amount of VAT to FMV, ensures that the tax adjustment made to USP is not greater than the amount of VAT added to FMV and does not make a COS adjustment to the amount of VAT added to FMV. *Remand Results* at 2–5; *Defendant's Rebuttal to Federal-Mogul Corporation's Comments Concerning Defendant's Final Results of Redetermination Pursuant to Court Order ("Defendant's Comments")* at 2.

For a detailed discussion of Federal-Mogul and defendant's arguments on this issue, see this Court's decision in *Federal-Mogul Corp. v. United States*, 17 CIT ____, ____, Slip Op. 93–194 at 5–11 (Oct. 7, 1993).

Defendant requests this Court to reconsider its recent decisions in *Federal-Mogul Corp. v. United States*, 17 CIT ____, Slip Op. 93–194, and *Torrington Co. v. United States*, 17 CIT ____, Slip Op. 93–198 (Oct. 8, 1993), which found that the ITA's new VAT methodology is not in accordance with law.

Defendant-intervenors SKF and NTN Bearing Corporation of America and NTN Kugellagerfabrik (Deutschland) GmbH ("NTN") essentially support defendant's arguments on this issue. *Comments of SKF Regarding Final Remand Results ("SKF's Comments")* at 1–3; *NTN's Comments on the Remand Determination of the United States Department of Commerce, International Trade Administration ("NTN's Comments")* at 2–4.

SKF emphasizes that unless the VAT rate is applied to comparable FMV and USP tax bases, application of the VAT rate to USP may result

in the creation of dumping margins, a result which SKF contends cannot be allowed pursuant to the Court of Appeals for the Federal Circuit's decision in *Zenith*, 988 F.2d at 1582. *Response of SKF to Comments of Federal-Mogul Regarding Final Results of Redetermination ("SKF's Response")* at 2–7.

This Court remanded this issue for the ITA "to examine the administrative record to determine the exact monetary amount of VAT paid on each sale in the home market and make sure that the amount added to the comparable USP sale pursuant to 19 U.S.C. § 1677a(d)(1)(C) is less than or equal to this amount, to add the full amount of VAT paid in the home market to FMV without adjustment * * *." *Federal-Mogul*, 17 CIT at ____, 824 F. Supp. at 237. Nowhere did this Court discuss changing the ITA's method of adding an amount to USP pursuant to 19 U.S.C. § 1677a(d)(1)(C) to account for the German VAT. ITA was only to "make sure that the amount added to the comparable USP sale pursuant to 19 U.S.C. § 1677a(d)(1)(C) is less than or equal to [the amount added to FMV] * * *." *Federal-Mogul*, 17 CIT at ____, 824 F. Supp. at 237. In fact, this Court implicitly affirmed the ITA's methodology for adjusting USP in its discussion of the tax base issue in *Federal-Mogul Corp. v. United States*, 17 CIT ____, ____, 813 F. Supp. 856, 865–66 (1993).

This Court has fully addressed defendant and defendant-intervenor's arguments on this issue and adheres to its decision in *Federal-Mogul*, 17 CIT at ____, Slip Op. 93–194 at 11–14.

Therefore, since as a matter of law the ITA has incorrectly adjusted USP for the German VAT, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to apply the German VAT rate to USP calculated at the same point in the stream of commerce as where the German VAT is applied for home market sales and add the resulting amount to USP.

2. *Adjustment to COS for Delayed Payment:*

Federal-Mogul also challenges the ITA's explanation of why delayed payment of home market sales expenses should not be factored into the calculation of COS adjustments to FMV. *Federal-Mogul's Comments* at 23–31.

In its Remand Results, the ITA explained why it does not adjust COS adjustments to FMV for delayed payment of expenses. First, ITA argues that 19 U.S.C. § 1677b(a)(4)(B) (1988) grants the ITA broad authority in determining and allowing adjustments for circumstances of sale, but that Congress expressed concern that any adjustment which the ITA allows be "reasonably identifiable, quantifiable, and directly related to the sales under consideration and [allowed] if there is clear and reasonable evidence of their existence and amount." *Remand Results* at 5 *(quoting* H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1979)).

Second, the ITA argues that its regulations implement the statutory intent by stating that the ITA will make a reasonable allowance for a dif-

ference in circumstance of sale if the price differential is wholly or partly due to such a difference of sale. 19 C.F.R. § 353.56(a) (1991). ITA's regulations also state that the ITA will allow a COS adjustment "for differences in selling costs (such as advertising) incurred by the producer or resellerbut normally only to the extent that such costs are assumed by the producer or reseller on behalf of the purchaser from that producer or reseller." 19 C.F.R. § 353.56(a)(2) (1991). Finally, in regard to quantifying a COS adjustment, the ITA's regulations state:

> In deciding what is a reasonable allowance for any difference in circumstances of sale, the Secretary normally will consider the cost of such difference to the producer or reseller but, if appropriate, may also consider the effect of such difference on the market value of the merchandise.

19 C.F.R. § 353.56(c) (1991); *Remand Results* at 5–7.

Defendant argues that the ITA's use of cost as a measure of differences in circumstances of sale is reasonable because accurately determining the difference in market value or true economic cost created by differences in circumstances of sale as requested by Federal-Mogul is virtually impossible and there is no reason to believe that such value adjustments could be determined accurately. In other words, the level of precision which Federal-Mogul argues is required in quantifying COS adjustments for delayed payment of home market selling expenses is not "reasonably identifiable [and] quantifiable." *Remand Results* at 6–10; *Defendant's Comments* at 8–10.

Therefore, the ITA argues that it is justified in using a respondent's financial records to determine differences in cost when quantifying COS adjustments. *Remand Results* at 10.

Defendant admits that the ITA does in some cases impute costs as requested by Federal-Mogul but only

> where such costs are not recorded in a company's financial records and an item is part of the terms of sale between the buyer and seller, and, as such, is expected to have a direct impact on the negotiated price. For example, credit is part of the terms of sale between the seller and buyer but its full cost is not always recorded in a company's financial records. However, because credit terms unquestionably affect the price negotiated between the buyer and seller, the Department must find a way to account for such differences. The only way to account for them is to impute them.
>
> The Department cannot ignore differences in prices owing to differences in credit terms because such differences constitute an assumption of costs by the seller on behalf of the buyer, as defined in 19 CFR 353.56(a)(2). This is in stark contrast to any potential delay of payment between the seller and its suppliers (such as an advertising agency), where an allowance for delayed payment of selling expenses would involve imputing expenses incurred not between the buyer and seller, but *between the seller and supplier*. While such

> credit may affect the notion of true economic cost to the seller, it tells us nothing about the differences in prices that result from the different circumstances-of-sale.

Remand Results at 10–11 (emphasis in original).

Finally, defendant argues that the United States Court of Appeals for the Federal Circuit's recent decision in *Daewoo Elecs. Co. v. United States,* Nos. 92–1558, –1559, –1560, –1561, –1562 at 16–18 (Fed. Cir. Sept. 30, 1993), supports the ITA's use of a respondent's financial records when quantifying COS adjustments.

SKF and NTN essentially agree with the defendant's arguments on this issue. *SKF's Response* at 7–11; *NTN's Comments* at 4–7.

NTN points out that the ITA has always preferred actual expense information over imputed expenses or costs. *NTN's Comments* at 4–5.

Federal-Mogul argues that, after repeated attempts, the ITA has still not articulated a reasonable explanation as to why the delayed payment of home market selling expenses should not be factored into the quantification of COS adjustments to FMV. Federal-Mogul discusses how the ITA has changed its reasoning for denying Federal-Mogul's requested adjustment over the course of this case and its companion cases which deal with the first administrative reviews of imports of antifriction bearings from various countries, especially the Japanese case (Consol. Court No. 91–07–00530). *Federal-Mogul's Comments* at 23–31.

This Court finds the Court of Appeals for the Federal Circuit's opinion in *Daewoo* instructive on this issue. In *Daewoo,* the court upheld the ITA's decision not to conduct an econometric analysis of home market tax incidence for purposes of making an adjustment to USP for the home market VAT. *Daewoo,* Nos. 92–1558, –1559, –1560, –1561, –1562 at 4–18. The court stated:

> In contrast to the commercial facts available in sales receipts, tax returns and other accounting records, an econometric analysis of tax pass-through requires numerous subsidiary market inquires, entails a high degree of speculation based on one economic theory rather than another, and produces results of dubious soundness.
>
> Similarly, when this court considered the ITA regulations that modified foreign market value based upon *cost* differences in circumstances of sales, rather than on "value", we recognized that "[t]he ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of [the ITA's] decision to rely on cost. Cost may be the only *practical* way to administer the statute." *Smith-Corona,* 713 F.2d at 1577 n.27. An econometric analysis of tax incidence may reasonably be rejected for the same reason. The delay and expense in making such an analysis in virtually every investigation would restrict the number of investigations which could be handled and interfere with the ITA's statutorily mandated duty to "complete the [antidumping] determination within rigid time limits." *Id* at 1577. Nor would this approach enable exporters to the United States to operate within the confines of the antidumping laws; antidumping duty assessments could issue based upon econometric measurements

> the exporter could not possibly predict. Further, we cannot conclude that the burden is worth undertaking because of more soundly based results.

Daewoo, Nos. 92–1558, –1559, –1560, –1561, –1562 at 16–18 (emphasis in original).

This Court finds that the same concerns apply to attempting to quantify COS adjustments to FMV. The statute, legislative history, the ITA's regulations and the *Daewoo* decision all lead this Court to the conclusion that the ITA is not required to reach the level of precision in quantifying COS adjustments which Federal-Mogul believes is required.

Therefore, this Court finds that the ITA is justified in using a respondent's financial records to quantify COS adjustments to FMV and is not required to factor in the effects of delayed payment of home market selling expenses on these COS adjustments.

CONCLUSION

In accordance with the foregoing opinion, since as a matter of law the ITA has incorrectly adjusted USP for the German VAT, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to apply the German VAT rate to USP calculated at the same point in the stream of commerce as where the German VAT is applied for home market sales and add the resulting amount to USP. ITA's decisions not to factor the delayed payment of home market selling expenses into COS adjustments to FMV, reinstatement of the "all others" cash deposit rate from the LTFV investigation for entries made between May 1, 1992 and June 23, 1992, which have not as yet become subject to a subsequent administrative review and correction of errors in the final margin computer programs for INA and SKF are affirmed. This case is dismissed.

(Slip Op. 93–222)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF (U.K.) LTD., AND PRATT & WHITNEY CANADA INC., DEFENDANT-INERVENORS

Court No. 91–07–00528

(Dated November 30, 1993)

JUDGMENT

TSOUCALAS, *Judge:* The Department of Commerce, International Trade Administration ("ITA"), having submitted its Final Results of Redetermination Pursuant to Court Remand, *Federal-Mogul Corporation v. United States* Slip Op. 93–88 (June 1, 1993) ("Remand Results"), and the Court having examined all comments filed in regard to the ITA's Remand Results, it is hereby

ORDERED that since as a matter of law the ITA has incorrectly adjusted United States price ("USP") for the United Kingdom's value added tax ("VAT"), and since there is no just reason for delay in the entry of final judgment on this issue, this Court is following its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ____, ____, Slip Op. 93–194 at 11–14 (Oct. 7, 1993), and is entering final judgment on this issue ordering the ITA to apply the United Kingdom's VAT rate to USP calculated at the same point in the stream of commerce as where the United Kingdom's VAT rate is applied for home market sales and add the resulting amount to USP; and it is further

ORDERED that the Court adheres to its decision in *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–221 (Nov. 30, 1993), and finds that the ITA's decision not to factor the delayed payment of home market selling expenses into circumstance of sale adjustments to foreign market value is in accordance with law and is affirmed; and it is further

ORDERED that the ITA's reinstatement of the "all others" cash deposit rate from the less-than-fair-value investigation for entries made between May 1, 1992 and June 23, 1992, which have not as yet become subject to a subsequent administrative review is affirmed; and it is further

ORDERED that the ITA's correction of errors in the final margin computer program for RHP Bearings and RHP Bearings Inc. is affirmed: and it is further

ORDERED that this case is dismissed.

(Slip Op. 93–223)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., AND SKF SVERIGE AB, DEFENDANT-INTERVENORS

Court No. 91–07–00529

(Dated November 30, 1993)

JUDGMENT

TSOUCALAS, *Judge:* The Department of Commerce, International Trade Administration ("ITA"), having submitted its Final Results of Redetermination Pursuant to Court Remand, *Federal-Mogul Corporation v. United States* Slip Op. 93–90 (June 2, 1993) ("Remand Results"), and the Court having examined all comments filed in regard to the ITA's Remand Results, it is hereby

ORDERED that since as a matter of law the ITA has incorrectly adjusted United States price ("USP") for Sweden's value added tax ("VAT"), and since there is no just reason for delay in the entry of final judgment on this issue, this Court is following its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ____, ____, Slip Op. 93–194 at 11–14 (Oct. 7, 1993), and is entering final judgment on this issue order-

ing the ITA to apply Sweden's VAT rate to USP calculated at the same point in the stream of commerce as where Sweden's VAT rate is applied for home market sales and add the resulting amount to USP; and it is further

ORDERED that the Court adheres to its decision in *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–221 (Nov. 30, 1993), and finds that the ITA's decision not to factor the delayed payment of home market selling expenses into circumstance of sale adjustments to foreign market value is in accordance with law and is affirmed; and it is further

ORDERED that the ITA's reinstatement of the "all others" cash deposit rate from the less-than-fair-value investigation for entries made between May 1, 1992 and June 23, 1992, which have not as yet become subject to a subsequent administrative review is affirmed; and it is further

ORDERED that this case is dismissed.

(Slip Op. 93–224)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE, S.A., SNR ROULEMENTS, SNR BEARINGS, USA, INC., EUROCOPTER FRANCE, AEROSPATIALE HELICOPTER CORP., AND PRATT & WHITNEY CANADA INC., DEFENDANT-INTERVENORS

Court No. 91–07–00531

(Dated November 30, 1993)

JUDGMENT

TSOUCALAS, *Judge:* The Department of Commerce, International Trade Administration ("ITA"), having submitted its Final Results of Redetermination Pursuant to Court Remand, *Federal-Mogul Corporation v. United States* Slip Op. 93–94 (June 3, 1993) ("Remand Results"), and the Court having examined all comments filed in regard to the ITA's Remand Results, it is hereby

ORDERED that since as a matter of law the ITA has incorrectly adjusted United States price ("USP") for France's value added tax ("VAT"), and since there is no just reason for delay in the entry of final judgment on this issue, this Court is following its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ____, ____, Slip Op. 93–194 at 11–14 (Oct. 7, 1993), and is entering final judgment on this issue ordering the ITA to apply France's VAT rate to USP calculated at the same point in the stream of commerce as where France's VAT rate is applied for home market sales and add the resulting amount to USP; and it is further

ORDERED that the Court adheres to its decision in *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–221 (Nov. 30, 1993), and finds

that the ITA's decision not to factor the delayed payment of home market selling expenses into circumstance of sale adjustments to foreign market value is affirmed; and it is further

ORDERED that the ITA's reinstatement of the "all others" cash deposit rate from the less-than-fair-value investigation for entries made between May 1, 1992 and June 23, 1992, which have not as yet become subject to a subsequent administrative review is affirmed; and it is further

ORDERED that this case is dismissed.

(Slip Op. 93–225)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF INDUSTRIES, S.P.A., AND FAG CUSCINETTI S.P.A., DEFENDANT-INTERVENORS

Court No. 91–07–00532

(Dated November 30, 1993)

JUDGMENT

TSOUCALAS, *Judge:* The Department of Commerce, International Trade Administration ("ITA"), having submitted its Final Results of Redetermination Pursuant to Court Remand, *Federal-Mogul Corporation v. United States* Slip Op. 93–95 (June 4, 1994) ("Remand Results"), and the Court having examined all comments filed in regard to the ITA's Remand Results, it is hereby

ORDERED that since as a matter of law the ITA has incorrectly adjusted United States price ("USP") for Italy's value added tax ("VAT"), and since there is no just reason for delay in the entry of final judgment on this issue, this Court is following its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ___, ___, Slip Op. 93–194 at 11–14 (Oct. 7, 1993), and is entering final judgment on this issue ordering the ITA to apply Italy's VAT rate to USP calculated at the same point in the stream of commerce as where Italy's VAT rate is applied for home market sales and add the resulting amount to USP; and it is further

ORDERED that the Court adheres to its decision in *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–221 (Nov. 30, 1993) and finds that the ITA's decision not to factor the delayed payment of home market selling expenses into circumstance of sale adjustments to foreign market value is in accordance with law and is affirmed; and it is further

ORDERED that the ITA's reinstatement of the "all others" cash deposit rate from the less-than-fair-value investigation for entries made between May 1, 1992 and June 23, 1992, which have not as yet become subject to a subsequent administrative review is affirmed; and it is further

ORDERED that the ITA's correction of errors in the final margin computer program for RIV-SKF is affirmed; and it is further

ORDERED that this case is dismissed.

(Slip Op. 93–226)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., AND SKF SVERIGE AB, DEFENDANT-INTERVENOR

Court No. 91–08–00566

(Dated November 30, 1993)

JUDGMENT

TSOUCALAS, *Judge:* The Department of Commerce, International Trade Administration ("ITA"), having submitted its Final Results of Redetermination Pursuant to Court Remand, *The Torrington Company v. United States* Slip Op. 93–175 (September 8, 1993) ("Remand Results"), and the Court having examined all comments filed in regard to the ITA's Remand Results, it is hereby

ORDERED that since as a matter of law the ITA has incorrectly adjusted United States price ("USP") for Sweden's value added tax ("VAT"), and since there is no just reason for delay in the entry of final judgment on this issue, this Court is following its decision on this issue in *Torrington Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–198 at 8–10 (Oct. 8, 1993), and is entering final judgment on this issue ordering the ITA to apply Sweden's VAT rate to USP calculated at the same point in the stream of commerce as where Sweden's VAT rate is applied for home market sales and add the resulting amount to USP; and it is further

ORDERED that this case is dismissed.

(Slip Op. 93–227)

H. REISMAN CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 92–08–00569

[Judgment for plaintiff.]

(Dated December 1, 1993)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr. and *Frederic D. Van Arnam, Jr.)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert), Mark G. Nackman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court following a trial *de novo.* The issue to be determined is the proper classification of merchandise that provides vitamin B–12 in animal feed. The court eliminated certain classifications following trial. The court also now eliminates classification as a "medicament," as the merchandise is not used in a

therapeutic or prophylactic manner beyond the purposes provided by any nutrient, including ordinary grain feed or food of any kind.[1]

The United States Customs Service ("Customs") classified the product at issue as vitamin B–12, under item 2936.26.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] The remaining classifications claimed by plaintiff are item 2308.90.80, other vegetable material of a kind used in animal feeding; item 2309.90.90, other preparations of a kind used in animal feeding;[3] and item 2936.90.00, other provitamins and vitamins, including natural concentrates.

FACTS

The imported merchandise is a reddish brown liquid, consisting of approximately 3% vitamin B–12 compounds, 20% proteinaceous matter,

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[1] The product also does not appear to be "mixed" as required by item 3003.90.00 of the Harmonized Tariff Schedule of the United States (1992).

[2] The relevant tariff provisions in Chapter 29 read as follows:

2936	Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent:
2936.10.00	Provitamins, unmixed
	Vitamins and their derivatives, unmixed:
2936.21.00	Vitamins A and their derivatives
2936.22.00	Vitamin B1 (Thiamine) and its derivatives
2936.23.00	Vitamin B2 (Riboflavin) and its derivatives
2936.24.00	D- or DL-Pantothenic acid (Vitamin B3 or Vitamin B5) and its derivatives
2936.25.00	Vitamin B6 (Pyridoxine and related compounds with Vitamin B6 activity) and its derivatives
2936.26.00	Vitamin B12 (Cyanocobalamin and related compounds with Vitamin B12 activity) and its derivatives
2936.27.00	Vitamin C (Ascorbic acid) and its derivatives
2936.28.00	Vitamin E (Tocopherols and related-compounds with Vitamin E activity) and its derivatives
2936.29	Other vitamins and their derivatives:
2936.29.10	Folic acid
2936.29.15	Niacin and niacinamide
	Other:
2936.29.20	Aromatic or modified aromatic
2936.29.50	Other
2936.90.00	Other, including natural concentrates

HTSUS (1992).

[3] The relevant tariff provisions in Chapter 23 read as follows:

2308	Vegetable materials and vegetable waste, vegetable residues and byproducts, whether or not in the form of pellets, of a kind used in animal feeding, not elsewhere specified or included:
2308.10.00	Acorns and horse-chestnuts
2308.90	Other:
2308.90.30	Screenings, scalpings, chaff or scourings, ground, or not ground, of flaxseed (linseed)
2308.90.50	Dehydrated marigolds
2308.90.80	Other
2309	Preparations of a kind used in animal feeding:
	Dog or cat food, put up for retail sale
2309.90	Other:
2309.90.10	Mixed feeds or mixed feed ingredients
	Other:
2309.90.30	Animal feeds containing milk or milk derivatives
	Other:
2309.90.60	Animal feeds containing egg
2309.90.90	Other

HTSUS (1992).

77% water, and trace materials. Water is disregarded for purposes of classification. The merchandise is an eluate, that is, washings of a separation process, and is a colloidal suspension rather than a solution. The vitamin B–12 in the merchandise is not in crystalline form as is pure vitamin B–12 for human consumption. The vitamin B–12 in the merchandise is also not a natural concentrate.

The merchandise is the result of the fermentation of vegetable matter, essentially sugar and molasses. Such matter is transformed so completely by the processing that it has virtually nothing in common with the starting materials. The merchandise is produced as a side stream of the manufacture of crystalline vitamin B–12. It is described as the "spent broth." In order to be suitable for use in animal feed, the liquid side stream product is dehydrated and powdered. It is sometimes mixed with ground corn cobs or rice hulls so that it may be properly distributed in animal feed premixes. It is also sold in an unmixed form. The merchandise is only suitable for use in animal feed. It is not commercially feasible to process the eluate into pure vitamin B–12. The merchandise, however, is of value only because of its vitamin B–12 content.

The vitamin B–12 portion of the product consists of two different forms of vitamin B–12: cyanocobalamin and hydroxocobalamin. Each of these is a separately defined organic chemical compound. The proteinaceous matter is another totally separate ingredient. The compounds and other ingredients are not mixed together, but are simply the result of the fermentation process. These facts are admitted or were established by essentially uncontradicted testimony at trial.

DISCUSSION

The first question to be addressed is whether the merchandise may be classified under chapter 29, as Customs' classification and one of plaintiff's classifications are contained within that chapter. The overlying issue in this case is whether Chapter 29 covers all commercially known forms of a vitamin, or whether a more chemically oriented approach is reflected in the structure of Chapter 29. The court believes that the latter position is correct, as the following discussion indicates.

Chapter note 1 defines with great specificity the types of merchandise that are included within Chapter 29.[4] Note 1(a) allows separately

[4] Note 1 to Chapter 29 reads as follows:

1. Except where the context otherwise requires, the headings of this chapter apply only to:

(a) Separate chemically defined organic compounds, whether or not containing impurities;

(b) Mixtures of two or more isomers of the same organic compound (whether or not containing impurities), except mixtures of acyclic hydrocarbon isomers (other than stereoisomers), whether or not saturated (chapter 27);

(c) The products of headings 2936 to 2939 or the sugar ethers and sugar esters, and their salts, of heading 2940, or the products of heading 2941, whether or not chemically defined;

(d) Products mentioned in (a), (b) or (c) above dissolved in water;

(e) Products mentioned in (a), (b) or (c) above dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than for general use;

(f) The products mentioned in (a), (b), (c), (d) or (e) above with an added stabilizer necessary for their preservation or transport;

(g) The products mentioned in (a), (b), (c), (d), (e) or (f) above with an added antidusting agent or a coloring or odoriferous substance-added to facilitate their identification or for safety reasons, provided that the additions do not render the product particularly suitable for specific use rather than for general use;

(h) The following products, diluted to standard strengths, for the production of azo dyes: diazonium salts, couplers used for these salts and diazotizable amines and their salts.

Note 1 to Chapter 29, HTSUS (1992).

chemically defined organic compounds to be classified under the chapter. As indicated, the product contains two separately defined organic chemical compounds, as well as proteinaceous material. Even if the proteinaceous material is disregarded, the product is still a combination of two separately defined organic compounds. The Explanatory Notes to the Harmonized Tariff System ("the Explanatory Notes"), in addressing Chapter 29, make clear that in order to satisfy Note 1(a), the product must be a "single chemical compound of known structure."[5] Customs Co-Operation Council, 1 Harmonized Commodity Description and Coding System, Explanatory Notes, Ch. 29, General Note A, at 326 (1988 Supp.). Thus, the product does not fit within Note 1(a). Any pure vitamin B–12 compound may be classified under Chapter 29 according to the direction of Note 1(a), but merchandise which includes two compounds is not within the purview of Note 1(a).

Further, the court recognized the inapplicability of Note 1(b) at trial. The product is clearly not a mixture of two or more isomers of the same compound. Nor is the merchandise a product of heading 2936, as specified in Note 1(c). In chemical terms a product is "a substance produced from one or more other substances as a result of chemical change." *Webster's Third New International Dictionary* 1810 (1981). (Defendant offers no contrary definition.) The imported product is not obtained by chemically altering vitamin B–12[6] or any other separately listed vitamin under heading 2936. Notes 1(d) through (g) do not apply because they require that the merchandise described therein contain an item listed in a preceding subpart of Note 1. Note 1(h) does not apply by its terms. Accordingly, the merchandise is not described in Note 1.

Note 1, however, contains an escape valve. Despite the careful cataloging of Note 1, merchandise may be classified within Chapter 29 if the "context otherwise requires" such classification. *See,* Note 1 to Chapter 29, HTSUS. The Explanatory Notes state that provitamins and vitamins (including concentrates and intermixtures) are to be classified in Chapter 29, even though they may not be separately defined chemical compounds. 1 Harmonized Commodity Description and Coding System, Explanatory Notes, Ch. 29, General Note C, at 327. The Explanatory Notes agree with the plain language of heading 2936, and therefore the context otherwise requires that such intermixtures and concentrates be classified under heading 2936. Thus, if the merchandise were an intermixture or concentrate of cyanocobalamin and hydroxocobalamin (whether pure or impure or in a solvent or not) it would fall under heading 2936. It is neither of these. The merchandise is clearly not a concentrate, and the merchandise contains six times as much proteinaceous material as vitamin.

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[5] The Explanatory Notes are "generally indicative of proper interpretation of the various provisions of the [Harmonized Tariff System]." *Lynteq, Inc. v. United States,* 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582).

[6] The Explanatory Notes describe vitamin B–12 as a dark red *crystal.* Customs Co-Operation Council, 1 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 29.36, at 405 (1st ed. 1986). The product as issued is not crystalline, nor is it derived from crystalline vitamin B–12.

The proteinaceous material is not simply an impurity in the vitamin B–12 product.[7] The addition of proteinaceous material is a natural part of the manufacturing process and there is no need or desire to eliminate the material from this animal food product. In fact, more non-nutritive material is added to the merchandise, once it is dehydrated, in order to aid in mixing with other animal feed ingredients. The court cannot find a way to squeeze this multi-ingredient merchandise into the terms of Note 1 and the "context" does not appear to require its classification anywhere in Chapter 29. Other contexts within Chapter 29 may require disregard of the listing in Note 1, as defendant's examples indicate, but these are not the contexts that might include this merchandise.

The main thrust of defendant's argument seems to be that Vitamin B–12 is an *eo nomine* classification, which includes all forms of the product. The argument continues that because the vitamin is the active ingredient in the merchandise and the merchandise is labeled and sold only for this content, that the merchandise is vitamin B–12.[8] Defendant wishes the court, in essence, to ignore the careful listing of Note 1 and essentially all of the explanatory notes in favor of its *eo nomine* argument.

The merchandise at issue is a combination of two organic compounds and substantial amounts of proteinaceous material and other substances. This is the nature of the merchandise. It simply does not fit within the wording of Chapter 29, even if its purpose is to serve the same function for animals as does pure crystalline vitamin B–12 for humans. Ordinary rules of statutory construction dictate that the court not apply the "context otherwise requires" language of Note 1 in a manner which makes the careful listing of the note meaningless. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 111 S. Ct. 2166, 2171–72 (1991) (as a general rule, a statute should not be construed in such a way as to render any part of it meaningless). Defendant's *eo nomine* argument would do just that. The court need not choose among subheadings within Chapter 29, as the entire chapter is not applicable to this product.

The court will now turn to the claimed classifications within Chapter 23. As noted earlier, item 2309.90.90 covers other preparations of a kind used in animal feeding. The Explanatory Notes describe heading 2309 as including products that are obtained from processing vegetable matter (e.g. sugar and molasses) and which have lost the characteristic cellular structure of the original vegetable matter. 1 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 23.09, at 176. This description would seem to fit the product at issue exactly. The Explanatory Notes also indicate that the preparations that are covered under heading 2309 include preparations for use in making supplementary feeds and preparations consisting of an active sub-

[7] None of the definitions of impurity offered by the parties was met.

[8] Defendant did not specifically argue that the product is "no more than" vitamin B–12 because the proteinaceous material is non-active or auxiliary. The court assumes that defendant did not argue this aspect of general *eo nomine* law because of the specific wording of Note 1. The court agrees that Note 1 precludes such an approach.

stance, such as a vitamin or antibiotic, in a carrier. *Id.* at 178. The *example* of the dried contents of a fermentation vessel which contains between 8 and 16 percent antibiotic is a close analogy.[9] *Id.* at 177. Thus, item 2309.90.90 would seem to describe the merchandise very closely.

The fact that the animal feed preparation is still suspended in water at the time of importation should not have an effect on classification, as the parties appear to concede. In its post-trial brief, defendant appears to abandon its argument that the merchandise is not a preparation of a kind used in animal feeding because it is ordinarily dried and powdered before it is added to other preparations for feeding to animals.[10] The merchandise only has one purpose and many other recognized animal feed preparations require further processing, such as mixing, before feeding to animals.

Note 1 to Chapter 23 does indicate that byproducts of vegetable processing are not covered by heading 2309. Note 1 to Chapter 23, HTSUS. The Explanatory Notes reflect that what is meant are byproducts of products described in heading 2308, that is, vegetable material and waste of a kind used in animal feeding. 1 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 23.09, at 178. The merchandise at issue begins as a byproduct of vegetable material processing for pure vitamin B–12 production, but the byproduct is further processed in a separate side stream production process. Thus, the merchandise is not a simple byproduct of merchandise described in heading 2308. Accordingly, the merchandise at issue is not excluded from heading 2309. Furthermore, heading 2308 itself does not describe the merchandise.

In sum, the court finds that item 2309.90.90 provides the correct classification for the merchandise at issue. Customs shall so reliquidate the entries at issue and make appropriate refunds with interest as required by law.

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[9] There is, however, an exclusion to heading 2309 for the filtered first stage extractions of the antibiotic manufacturing process and the residues of this process. See 1 Harmonized Commodity Description and Coding System, Explanatory Notes, Heading No. 23.09, at 178. The court assumes defendant did not argue this in its post-trial brief as the exclusion is much narrower than the inclusory note relied on by the court in the above discussion.

[10] Testimony indicates that although it is not the usual practice, the merchandise in imported form could be used directly in other animal feed preparations.

(Slip Op. 93–228)

MUSIC CENTER S.N.C. DI LUCIANO PISONI & C., LUCIEN S.N.C. DI DANILO PISONI & C., AND ENZO PIZZI, INC., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANT, AND PRESTINI MUSICAL INSTRUMENTS CORP., DEFENDANT-INTERVENOR

Court No. 93–08–00430

(Dated December 2, 1993)

JUDGMENT

RESTANI, *Judge:* This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED: that this action is dismissed as premature. The court has received no evidence to indicate Commerce is not investigating properly the APO violation changes alleged by plaintiff.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/141 11/23/93 Aquilino, J.	E. Gluck Corp.	84–11–01544	716.09 through 716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43 or 688.42, etc. Various rates	Belfont Sales Corp. *v.* United States (1987) 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* United States 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C93/142 11/23/93 Aquilino, J.	E. Gluck Corp.	84–11–01612	716.09 through 716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43 or 688.42, etc. Various rates	Belfont Sales Corp. *v.* United States (1987) 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* United States 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C93/143 11/23/93 Aquilino, J.	E. Gluck Corp.	84–11–01614	715.05, etc., Various rates	688.40, 688.45, 688.43 or 688.42, etc. Various rates	Belfont Sales Corp. *v.* United States (1987) 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* United States 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C93/144 11/23/93 Aquilino, J.	E. Gluck Corp.	86–04–00454	715.05, etc., Various rates	688.40, 688.45, 688.43 or 688.42, etc., Various rates	Belfont Sales Corp. *v.* United States (1987) 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* United States 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C93/145 11/23/93 DiCarlo, J.	J-Star Industries, Inc.	91–02–00086	7315.90.00 5.7% 8436.99.00, 9817.00.60 Free	7315.19.00 4.2%	Agreed statement of facts	Port: not stated Chain linkage use in conveyors
C93/146 11/23/93 DiCarlo, J.	Mattel, Inc.	89–03–00117	737.40, 737.49, 737.95 10.9%, 9.6%, 8.3%	912.20 Free of duty	Mattel, Inc. *v.* United States 926 F.2d 1116 (1991)	Los Angeles Various toys not over five cents per unit

C93/147 11/23/93 Carman, J.	Payless Shoesource, Inc.	92–09–00637	6402.91.70 90¢/pair and 37.5%	6402.91.40 6%	Agreed statement of facts	Los Angeles Footwear, Protonic Lot No. 9002
C93/148 11/23/93 Goldberg, J.	Wing Enterprises, Inc.	91–08–00629	Not stated Not stated	7616.90 5.7% 706.62 20%	Agreed statement of facts	Great Falls, Montana Boxes of various shapes, sizes and weights made of aluminum alloy

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V93/20 11/30/93 Newman, J.	Infasco, Division of Ivaco, Inc.	82-07-00972	Not stated	Entered value less the included foreign inland freight	Agreed statement of facts	Buffalo-Niagara Falls, NY Sault St. Marie, MI Canadian freight, CDN freight, freight to port of exit, etc.
V93/21 11/30/93 Newman, J.	MacMillan Blodel Ltd.	82-11-01504	Not stated	Entered value less the included foreign inland freight	Agreed statement of facts	Buffalo-Niagara Falls, NY Canadian freight, CDN freight, freight to port of exit, etc.
V93/22 11/30/93 Newman, J.	Melwood Products	82-02-00185	Not stated	Entered value less the included foreign inland freight	Agreed statement of facts	Champplain-Rouses Point, NY Canadian freight, CDN freight, freight to port of exit, etc.
V93/23 11/30/93 Newman, J.	Monsanto Company	83-02-00182	Not stated	Entered value less the included foreign inland freight	Agreed statement of facts	Ogdensburg, NY Canadian freight, CDN freight, freight to port of exit, etc.
V93/24 11/30/93 Newman, J.	Monsanto Company	85-01-00006	Not stated	Entered value less the included foreign inland freight	Agreed statement of facts	Ogdensburg, NY Canadian freight, freight to port of exit, etc.
V93/25 11/30/93 Newman, J.	Norman G. Jensen, Inc.	82-08-01186	Not stated	Entered value less the included foreign inland freight	Agreed statement of facts	Duluth, MN Canadian freight, CDN freight, freight to port of exit, etc.

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Abstracted Decisions

*Due to the confidential nature of this opinion the document is not available for publication at this time.

U.S. G.P.O. 1993–301–610–60075